IN THE

Supreme Court of the United States

October Term 1948.

No. 172

JERRY SPAGNUOLO,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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OCTOBER TERM 1948.

JERRY SPAGNUOLO, *Petitioner,* AGAINST UNITED STATES OF AMERICA, *Respondent.*	No. .....

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered on June 23, 1948, affirming a judgment of conviction in this criminal cause.

Opinions Below.

There was no opinion in the District Court.

The affirmance in the Circuit Court of Appeals was unanimous, Frank, *C. J.*, writing a supplemental opinion to clarify a statement in the opinion of Clark, *C. J.* with which he disagreed. These opinions have not yet been reported, but they are printed at the end of the certified copy of the record submitted herewith.

Jurisdiction.

The jurisdiction of this court is invoked under Rule 37(b) of the Rules of Criminal Procedure and Title 28, Section 347, United States Code.

Questions Presented.

In this case, under a single count indictment charging that the defendant-appellant in the court below on June 6, 1947, wilfully and knowingly possessed 2 and 2/5 gallons of distilled spirits consisting of alleged Johnny Walker Black Label Scotch Whiskey in 12 four-fifths quart bottles without there being affixed to the containers stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes thereon, in violation of Title 26, Section 2803(a), United States Code, was it not prejudicial error to admit evidence of prior irrelevant, independent and distinct acts and crimes, to wit: the presence of petitioner here in the automobile of another man at the time of the transaction for the sale of other Scotch whiskey by said other man in or about January, 1947, to the Government's principal witness, Howard Johnson (Record on Appeal, p. 12, fols. 34, 35); and evidence of a conversation between an Alcohol Tax Unit agent and said witness on June 4, 1947, relative to a bottle of Scotch whiskey, at which conversation petitioner was not present? (Record on Appeal, p. 37, fols. 109, 110).

Objection to the admission of the said evidence was duly taken (Record on Appeal, p. 12, fol. 35; p. 37, fol. 109).

STATUTE INVOLVED.

Title 26, Section 2803, Subdivision (a), United States Code Stamps for Containers of Distilled Spirits.

(a) Requirement. No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the

immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue stamps imposed on such spirits. * * *

Statement.

The evidence tended to show that on June 4, 1947, one, Howard Johnson, met Agent Silvers of the Alcohol Tax Unit in a bar and grill as a result of a conversation regarding a bottle of Scotch whiskey (R. f. 109)* that Silvers had had with the proprietor of the bar prior to said meeting. Subsequent to this meeting, a further meeting was had on the following day and an arrangement made to meet on June 6, 1947 at 3 P. M. at the same bar (R. f. 111).

On that day, June 6, 1947, at about 12:30 P. M., the witness, Howard Johnson, came out of the apartment house in which he resided and saw the petitioner in front of his house (R. f. 24). Petitioner is alleged to have told him that he had some whiskey for him (R. f. 25) inside (R. f. 29) but Johnson told him he did not have the money for it with him and asked him to wait while he got it (R. f. 29). Instead of going for the money, he went to the bar where he had made the appointment to meet Agent Silvers and pointed petitioner out to him and his partner, Agent Kearins (R. f. 30).

Agent Silvers then kept petitioner under observation for about an hour and went up to the corner where he was standing, identified himself, interrogated him as to his presence in the neighborhood and detained him (R. ff. 113, 114).

In the meantime Agent Kearins had gone to the apartment building in which the witness, Howard Johnson, resided and from the lady in charge of the building office,

*R. f. refers to folios of printed Transcript of Record.

one, Willie B. Lewis, obtained two brown paper packages (R. f. 98) which had been left with her earlier that day by a person to whom she paid no attention because she was busy (R. f. 97). When the agents brought petitioner to her for identification, the undisputed testimony of all the Government witnesses is that she stated she had never seen him before (R. ff. 104, 129, 148).

One, Clifford Johnson, the elevator operator in the building, testified that he had been approached by a white man during the morning of June 6, 1947 and asked whether he could leave a package on the elevator for Mr. Johnson (R. ff. 90, 91). He refused this request and directed the man to the building office. He was unable to identify petitioner as being the man in question when the agents confronted the witness with petitioner (R. ff. 95, 125, 147).

There was testimony to the effect that at the time in January, 1947, when the unknown person sold certain Scotch whiskey to Howard Johnson, and petitioner was present in the automobile, this person gave Johnson his telephone number where he could be reached (R. f. 36) and that Johnson called this number when ordering Scotch whiskey on June 6, 1947 (R. f. 38).

There was no testimony or evidence adduced which placed petitioner in physical possession of the liquor. Howard Johnson did not see the packages, did not see petitioner in possession of the liquor, did not receive the liquor from petitioner, nor did he pay him anything (R. ff. 78-80).

Petitioner made no admissions of any kind at or after his arrest and did not take the stand as a witness in his own behalf.

POINT I.

The admission in evidence over proper objection of testimony as to the transaction between Howard Johnson and the other man in January, 1947, when Johnson purchased Scotch whiskey was prejudicial error.

True it is that petitioner is claimed by Howard Johnson to have been present in an automobile when the purchase and sale of Scotch whiskey was made in January, 1947, but the record is barren of any evidence to indicate the slightest participation by petitioner in this transaction.

Whether or not this was a crime, because it was not proved that the said whiskey when delivered did not bear on its immediate container or containers the requisite tax stamps, makes little actual difference, for the sole purpose of the prosecution in adducing this evidence was to create an atmosphere so that it might appear to the jury that petitioner was closely connected with the sale of illicit Scotch whiskey. It is no mere coincidence that the prosecutor laid stress on the word "Scotch" when referring to the whiskey purchased in January, 1947; the bottle relative to which Agent Silvers and the proprietor of the bar had the conversation on June 4, 1947, and the 12 bottles adduced in evidence as being the subject matter of the crime charged in the indictment (R. ff. 35, 36, 37, 38, 39, 110, 115).

While it is the prosecutor's privilege and even his duty to introduce evidence which is prejudicial to a defendant, he is nevertheless precluded from adducing evidence which is both prejudicial and incompetent and it is submitted that the evidence of the transaction of January, 1947, antedating the charge made in the indictment, in which the petitioner is not claimed to have had any participation whatsoever, was wholly inadmissible for any proper purpose and should have been excluded when objected to. That it was seriously prejudicial cannot be gainsaid.

In *McCandless* v. *United States* (298 U. S. 342, 347), this court said:

> "An erroneous ruling which relates to substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial."

See also *Lynch* v. *United States*, 12 F. (2nd) 193, 4 Cir.; *Newman* v. *United States*, 289 Fed. 712, 4 Cir.; *Carpenter* v. *United States*, 280 Fed. 598, 600, 4 Cir.; *Bullard* v. *United States*, 245 Fed. 837, 4 Cir.; *Day* v. *United States*, 220 Fed. 818, 4 Cir.; *Rau* v. *United States*, 260 Fed. 131, 2 Cir.

POINT II.

The admission in evidence over proper objection of the testimony of agent Silvers relative to his conversation with the proprietor of the bar about a bottle of Scotch whiskey was likewise prejudicially erroneous.

In this phase of the case, it is not even claimed that the petitioner was present, yet this evidence was permitted to be introduced despite proper and timely objection. Implicit in this tstimony was the commission of a crime by either Howard Johnson or the owner of the bar, or both (R. f. 71). Admittedly, petitioner had no connection therewith. It was offered solely to point up the Scotch whiskey phase of the transaction.

If, as stated in the opinion of the court below, this testimony and the other objected to as prejudicially erroneous was entitled to admission at the trial because of its "very close connection" with the crime as charged, then obviously evidence of acts and crimes wholly separate and distinct from that charged in the indictment, was employed to forge links in the chain of circumstances leading to the verdict of guilty. This presents a genuine conflict and

raises the question of justification for the opinion of the court below.

It is not controverted that the petitioner while present did not take any part in the January transaction between Howard Johnson and the other man with whom the witness had been dealing for some time (R. ff. 45, 46) and that he was not present on the occasion of the conversation in the bar (R. f. 109). Where then is this "very close connection" to be found between this evidence so erroneously admitted and the facts of the offense charged? It might be different were the testimony that the petitioner had had a part in these transactions, but it is undisputed that he did not. This testimony had no legitimate bearing upon the question at issue (*Moore* v. *United States*, 150 U. S. 57, 61).

The case of *United States* v. *Sebo*, 101 F. (2d) 889, 891, relied on by appellee and the court below in its opinion, presented an entirely different set of facts, both as to the physical situation of the defendant there and also as to the time element. In fact at page 891, the Circuit Court of Appeals seems to offer a half-hearted apology for its affirmance by relying on a time worn and hackneyed cliche and says:

> "Even if this evidence was not strictly admissible, we cannot believe that it had any real effect on the outcome of the trial."

And as to this, see Point III.

POINT III.

The petitioner was entitled to have incompetent prejudicial evidence excluded from the jury's consideration.

Whether in fact the error complained of was what swayed the jury and caused it to bring in a verdict of

guilty cannot, of course, be known. It is sufficient if on an appraisal of the entire record, it can be said to have had a substantial influence in this respect. Or even if grave doubt is engendered as a result of this error. It is not enough that the record may disclose sufficient to support the result for the function of the appellate court is not to determine the guilt or innocence of a defendant.

Kotteakos v. *United States* (328 U. S. 750); cited in *Fiswick* v. *United States* (329 U. S. 211); *Bollenbach* v. *United States* (326 U. S. 607); *Bruno* v. *United States* (308 U. S. 287); *Bihn* v. *United States* (328 U. S. 1172).

In the recent case of *United States* v. *Corrigan, et al.*, 2 Cir., decided May 28, 1948, cited by Frank, *C. J.*, in his opinion in the instant case, the court unanimously concluded that the evidence of guilt as disclosed in the record was overwhelming, yet because of the erroneous admission of two exhibits which reflected on Corrigan's integrity a reversal of the judgment was ordered and Swan, *C. J.*, in his opinion, said:

> "Whether in fact the reports influenced the jury's verdict is of course unknown and is immaterial, for an accused is entitled to have incompetent, prejudicial evidence excluded from the jury's consideration."

CONCLUSION.

It is respectfully submitted that the questions submitted indicate serious error which warrants the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 172

JERRY SPAGNUOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The amended opinion of the circuit court of appeals (R. 68-72) has not yet been reported.[1]

[1] To the original opinion issued by the circuit court of appeals there was appended a concurring opinion by Judge Frank, to which the present petition makes reference (Pet. 1, 8). Judge Frank thought that one sentence in the majority opinion unnecessarily relaxed the standards governing admission of evidence for the prosecution. See the original record on file with the Clerk of this Court. The amended opinion of the court below omits both the disputed sentence and the concurring opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered June 23, 1948 (R. 68). The petition for a writ of certiorari was filed July 23, 1948. The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U.S.C. 1254). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether, in a trial for illegal possession of Scotch whiskey, the court erred in admitting evidence of certain prior transactions involving other Scotch whiskey.

STATUTE INVOLVED

Section 2803 of the Internal Revenue Code, 26 U.S.C. 2803, provides in pertinent part:

> (a) *Requirement.* No person shall * * * possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * *
>
> (g) *Penalties.* Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding $1,000 or by imprisonment at hard labor not exceeding five years, or by both. * * *

STATEMENT

Petitioner was indicted in the District Court for the Southern District of New York for illegal possession of distilled spirits in violation of Section 2803 of the Internal Revenue Code (R. 5). After a jury trial he was convicted and sentenced to six months' imprisonment (R. 58, 62). The judgment was affirmed on appeal [2] (R. 68).

The evidence for the Government,[3] so far as pertinent to the issue raised by the petition, may be summarized as follows:

Howard Johnson testified that on the morning of June 6, 1947, he made a telephone call and ordered some Scotch whiskey (R. 9, 13); that when he walked out of the apartment house in which he lived, between 12:30 and 1:00 p.m., he met petitioner on the street, and petitioner said he had the whiskey for him "inside" (R. 8, 9, 10); that he told petitioner he would have to get the money (R. 10); that he left petitioner waiting in front of the apartment house and walked down the street three blocks to Degenhardt's Bar where, according to previous arrangement, he met two agents of the Alcohol Tax Unit (R. 7, 10); and that he then pointed out petitioner to the agents (R. 10). He also testified that he had first met petitioner the

[2] On July 13, 1948, Mr. Justice Jackson denied petitioner's application for bail pending action by this Court on the present petition.

[3] Petitioner did not take the stand and offered no evidence in his own behalf (R. 52, 53).

previous January; that at that time he bought Scotch whiskey from another man who was with petitioner; that he was given a phone number where he could reach the other man; and that he called that number when he ordered the whiskey on June 6 (R. 11-12, 13). He further testified that he phoned the order on June 6 because of a talk he had two or three days previously with the Alcohol Tax Unit agents regarding Scotch whiskey (R. 13). On cross-examination, Johnson stated that he sold the whiskey he bought in January to the owner of Degenhardt's Bar (R. 16-17); and that he ordered 12 bottles of Scotch on June 6 (R. 18). On redirect examination, he testified that he first met the agents about June 4, 1947, in Degenhardt's Bar; that they then questioned him about the whiskey he had sold to the owner in January; that he told the agents about the telephone number; and that it was as the result of this conversation that he telephoned the order on June 6 (R. 21; cf. R. 13, 24).

The Alcohol Tax Unit agents, Silvers and Kearins, testified that they met the witness Howard Johnson in Degenhardt's Bar on June 4, 1947, as the result of a talk they had with the owner about a bottle of Scotch whiskey (R. 36-37, 44); that they gave Johnson certain instructions and arranged to meet him again on June 6 (R. 37, 44); that they met Johnson about 1:00 p.m. on June 6 and he pointed out petitioner standing in the street (R. 38, 44-45); that after they had observed petitioner

standing there for about an hour they went up to him (R. 38, 45); that one of the agents entered the apartment house and found 12 bottles of alleged Scotch whiskey in the manager's office on the first floor (R. 38-39, 45-49); that the stamps on the bottles were counterfeit (R. 39, 47-48); and that they then arrested petitioner (R. 39, 49). On cross-examination, agent Silvers testified that they had been told by the apartment house manager and by the elevator boy that the packages containing the whiskey had been placed in the office by a white man shortly before noon (R. 42-43). There was other testimony to the effect that the apartment house is inhabited exclusively by Negroes (R. 34), whereas petitioner is a white man.

ARGUMENT

Petitioner contends that the trial court erred in admitting evidence of the January transaction and of the conversation on June 4, 1947, between the agents, Johnson and the owner of Degenhardt's Bar (Pet. 2, 5-7). We find it difficult to perceive any intelligible basis for the contention. On the one hand, petitioner appears to argue that he had no connection with either of the above mentioned transactions and that, therefore, they were irrelevant to the present accusation. On the other hand, he seems to argue that the evidence should have been excluded because it connected him with other separate and distinct criminal acts.

We think it clear that the petition is utterly without merit. The January transaction and the con-

versation of June 4 were obviously relevant. The first linked both Johnson and petitioner with the source of the liquor. The second established Johnson's reason for making the June 6 phone call which resulted in the simultaneous presence of the liquor inside, and of petitioner outside, the apartment house. It is true that the evidence complained of, while not necessarily showing the commission of other crimes by petitioner, created a very strong impression that he had been involved in other transactions. But it is beyond dispute that evidence of other criminal acts is admissible when, as here, it is a part of the *res gestae* and is relevant to show knowledge, identity, plan or intent. *Glasser* v. *United States,* 315 U.S. 60, 80, 81-82; *Lisenba* v. *California,* 314 U.S. 219, 227; *Moore* v. *United States,* 150 U.S. 57, 61; 1 Wigmore, *Evidence* (3rd ed. 1940), §§ 215-218.

CONCLUSION

The decision of the circuit court of appeals is correct and no conflict of decisions is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1948.

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